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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. KENYUS DESHON WALKER, Defendant and Appellant.	A143894 (Alameda County Super. Ct. No. C172981)

Appellant Kenyus Deshon Walker was convicted of first-degree murder (Pen. Code, § 187),[1] with firearm enhancements (§§ 12022.5, 12022.53), and a great bodily injury enhancement (§ 12022.7) based on his having shot Billy Brooks, Jr. in the head with a sawed-off shotgun when Brooks came to a drug house, where Walker acted as security, looking to purchase drugs. Several other people were in the house when the shooting occurred, and those who claimed to know who did the shooting all named Walker. Walker's attorney argued complete innocence, claiming Walker was not in the drug house when the shooting occurred and casting doubt on the credibility and motives of the witnesses against him. His attorney also argued heat-of-passion manslaughter as a lesser included offense and alternative theory of the case.

Walker's primary issue on appeal is that he was deprived of the effective assistance of counsel under the Sixth Amendment by his attorney's decision—he claims without sufficient investigation—to use a mistaken identity defense and heat-of-passion

[1] Undesignated statutory references are to the Penal Code.

mitigation rather than pursuing additional evidence, or using the evidence at trial, to develop and present a theory of self-defense or imperfect self-defense. There was a comprehensive motion for a new trial by a new defense attorney who substituted in to represent Walker after trial, based on ineffective assistance of counsel, which allows us to review the issue on direct appeal. (Cf. *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267 [ineffective assistance of counsel claims usually must be raised on habeas corpus].) We conclude there was no prejudice from the claimed errors of counsel.

In a supplemental opening brief, Walker claims he is entitled to a remand for resentencing based on the amendment to section 12022.53 that went into effect January 1, 2018, giving the sentencing judge discretion as to the imposition of a 25-to-life sentence enhancement that had previously been mandatory. (§ 12022.53, subd. (h).) The amendment is retroactive, and we will remand for resentencing.

I. BACKGROUND

Jennifer Johnson was working as a prostitute in Oakland about 2:00 a.m. on September 25, 2012, when Billy Brooks, Jr. drove up and asked if she wanted to come with him and do drugs. They went to her mother's house, where he snorted powder cocaine and she smoked crack cocaine, and they had sex.

Brooks and Johnson then went to a house on 80th Avenue in Oakland to buy some heroin to partially counteract the effect of the cocaine. Johnson testified she had previously purchased drugs at the 80th Avenue house and Brooks, too, claimed to be familiar with the house and needed no directions to get there. Brooks said Karnell Marshall, who lived at that house, was his "partner" and called him "Nell Baby." Marshall was a drug addict and dealer.

When they showed up at the house at about 3:00 a.m., they went to the front door, where Brooks asked for "Nell Baby" repeatedly, saying also, "What you got? What you got?" Johnson testified that Walker, whom she knew as "Nephew,"[2] answered the door

[2] Walker is also known as "Shon," evidently a shortened version of his middle name.

with a long gun in his hands, but she and Brooks were allowed into the house. It did not appear that Walker and Brooks knew each other. Brooks kept asking where "Nell Baby" was. Johnson told Walker they wanted to buy some heroin. Walker asked Brooks if he "had something," evidently meaning a weapon, and Brooks raised his hands and said no.

Walker had a sawed-off pump-action shotgun when he answered Brooks's knock at the door. Another resident who came to answer the door with Walker, Lawrence Landry,[3] testified that Brooks kept saying the house was his "mama's house" as he made his way into the house and once inside. In reality, the house had belonged to Walker's grandmother, Eva Moore.

Moore had a stroke and had to be moved to a convalescent home about a year or two earlier. In her absence the two-bedroom, one bath house had become home to a number of drug addicts and a place where others could come to purchase drugs. The addicts living there at the time of the killing were members of a close-knit group who all considered each other "family" because of their mutual ties to Moore. Lawrence, Marshall and Brooks all considered Moore to have been "like a mother" to them earlier in their lives, and they considered Walker to be "family," although they were not actually related. Marshall also testified that Brooks was like family to him.

Marshall, who had lived in the house most of his life, was the overseer of the house and occupied one of the two original bedrooms in the home. His girlfriend, Tameka Tolliver, was also present on the night Brooks was killed, but she did not live there. Walker's role around the time of the shooting was security. His duties included keeping the house running smoothly and making sure no one was loud or disorderly. There was a gun in every room and everyone had access to guns; people routinely walked around the house carrying guns.

Lawrence and Mechelle Landry, husband and wife, lived in a storage closet in the kitchen that had been converted into a bedroom. Lawrence was Marshall's brother, and

[3] Because Lawrence and Mechelle Landry share a surname, we will refer to them by their first names.

he had been raised by Walker's family. Mechelle and Marshall were the two in the house most involved in drug sales, but they left drugs around the house for others to sell when they were not home.

Anthony Allen also lived in the house on a back porch that had been converted into a bedroom. He had been coming around the house his whole life because Moore was his godmother. He was allowed by Walker to stay there after Moore moved out. Allen's role in the house was also as security and as a handyman and plumber.

All the members of the household testified at trial, but they were all high on heroin, cocaine, or methamphetamine on the night in question. There was conflicting testimony as to whether Walker lived in the house or elsewhere. All the residents were daily users of controlled substances, but they claimed to be functioning drug addicts.

The night of the shooting, Lawrence was smoking crack cocaine and watching a movie when he heard banging at the front door. He was not going to go see who it was, but the banging continued for five or ten minutes. He and Walker met in the kitchen and walked to the front door together. Lawrence did not see Walker holding anything as they walked to the door. Walker opened the front door and Lawrence saw Johnson with a person he did not recognize. Lawrence had known Brooks for years, but had not seen him in seven years, and Brooks had put on weight and looked different.

Brooks and Johnson entered the house asking for Marshall. Brooks was being loud and disrespectful. He kept saying this was his "mama['s] house" in a very loud voice. Walker told him to calm down, that he was being disrespectful. Brooks was inebriated and smelled of alcohol. Lawrence testified that Brooks had been very close with Moore. But this night he was "pushing up on" Walker, meaning he was aggressive and "in [Walker's] face," but Lawrence did not see a physical confrontation between the two. Walker and Brooks were face-to-face for about five minutes. Allen told police he heard Brooks telling Walker to shut up, that he (Brooks) knew what he was doing.

Brooks did settle down and apologized for being disrespectful. He asked to speak to Marshall. Lawrence went and knocked on Marshall's door and told him that Johnson and "some dude" were asking for him. When Lawrence turned to go back to his room,

Walker and Brooks started arguing again. Lawrence could hear Walker telling Brooks not to knock on Marshall's door. Brooks had been very aggressive from the moment he walked through the door, and the situation was escalating.

Then Lawrence heard Brooks say, "You [going to] pull an empty gun on me at a gunfight? Pull an empty gun. Nigga, you [fucked] up." Neither Lawrence nor Johnson heard Walker say anything. According to Johnson, the only eyewitness, Walker pointed the gun at Brooks and without saying anything, fired one time, but the gun did not go off. Johnson heard a "click" sound, but nothing happened. Then Brooks said, "Oh, you really gonna shoot me?" Then Walker pulled the trigger again, shooting Brooks in the head. Before she heard the gunshot, Johnson heard the same "click" sound she heard the first time, except the second time Walker pulled the trigger it sounded like something blew up. Brooks fell to the floor in a fetal position. Johnson got scared and ran to Marshall's room. Johnson testified Walker ran out the front door with the shotgun.

Lawrence described the events similarly. He heard the statement, "Nigga, don't knock on that door." Then he heard Brooks's statement about the "empty gun." Then he heard a "click" and a "pop." The "click" was the sound of the gun not firing. The "pop" sounded like a low gauge shotgun had been fired. There was no pause between the click and the pop. Lawrence did not hear the shotgun being pumped. Walker shot Brooks in the back of the head.[4] Lawrence came out of his room, looked at Walker and said, "You motherfucker."

At that point, Marshall, Tolliver, Mechelle and Allen all came out of their respective rooms to see what was happening. They saw Brooks's body slumped over on the floor, blood pouring out of his head, with Walker standing nearby holding the shotgun. Someone turned on the lights, Marshall moved the body slightly, recognized Brooks, and he "lost it." Walker told several people that Brooks had "disrespected" him,

[4] Walker characterizes it as being on the side of Brooks's head. It was behind and below the left ear, at the base of his skull. "Side" or "back" is a semantic quibble.

or "got smart" with him or was "rude." Allen said Walker explained to the group that Brooks had "knocked on the wrong door."

Whatever the exact nature of the dispute, Walker shot Brooks in the head with the shotgun, which Mechelle described as a black sawed-off shotgun with a brown wooden handle. The shotgun had broken and Allen had made another handle for it. The weapon had been in the house, and she, Walker, and Marshall had all handled it before the shooting. Tolliver thought the firearm she saw might have been brown. Lawrence called the shotgun gray. Allen said the murder weapon was a sawed-off pump shotgun with the handle sawed off.

Allen later told the police that Walker told him he pointed the gun at Brooks and pulled the trigger, but it did not go off, so he took off the safety and pulled the trigger again, killing Brooks. At trial, however, Allen had no recollection of telling the police these details. Mechelle and several others testified Walker left the house in a rush a few minutes after the shooting, taking the shotgun with him.

After Walker left the house, the others tried to decide what they should do. Lawrence wanted to call 911 and an ambulance, but Mechelle talked him out of it because she did not want to get herself or Walker into trouble. Mechelle took a leading role in deciding what to do next because everyone else "froze up." They retrieved Brooks's cell phone and keys from the dining room floor. They did not find a gun on or near Brooks. Mechelle dropped Brooks's cell phone into some water hoping to prevent it from being traced to the 80th Avenue house.

Mechelle, Lawrence, Allen and Marshall[5] wrapped the body in a blue tarp, carried it out to Brooks's car, and loaded it into the back seat. Mechelle and Allen drove Brooks's car to Arroyo Park, about a quarter mile from the drug house, and left it parked on a residential street nearby. The decomposing body was not discovered until two

[5] Marshall denied participating in getting rid of Brooks's body, saying he, Tolliver and Johnson were in his bedroom at the time.

weeks later, when a man walking his dogs near the park reported to the police a strong foul odor coming from the car.

After dropping Brooks's car near Arroyo Park, Mechelle and Allen returned to the house, and together with Lawrence, Marshall and Tolliver, cleaned up the blood. In moving the body and cleaning up the blood, Mechelle never saw a gun on Brooks or near his body. In fact, none of the witnesses who participated in the cleanup saw a gun on or near Brooks's body.

Walker stayed away from the house for three or four days after the shooting. When he returned, Mechelle, Walker, Lawrence, Marshall, Tolliver and Allen[6] had a conversation about what they would do if they were arrested. According to Mechelle and several others, they decided they would each own up to the role they played in the incident. Mechelle denied that the group decided to pin the crime on Walker, although they were all pretty upset with him for what he had done and how he had left them with a "mess" to clean up.

In the months after the shooting, Mechelle heard Walker brag about the killing; he talked about it frequently, laughed about it, and glorified it. The police, however, after recovering and identifying the body, developed no leads by the end of 2012 as to who might have killed Brooks. An autopsy showed that Brooks had been shot with a shotgun with the entrance wound being at the base of the skull behind the left ear. During this time Allen performed some renovations on the house, including covering the floor in the dining room with laminate flooring.

In February 2013, Johnson, who previously had been convicted of felony possession of cocaine, was arrested for a probation violation. While in custody, Johnson told the police what she knew about the death of Brooks, testifying she did so out of a pang of conscience and not to secure a more favorable outcome in her probation violation case. The police followed up and developed the foregoing evidence against Walker, in addition to the following physical evidence.

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[6] Allen denied being a part of this conversation.

Based on Johnson's information, the police obtained a search warrant for the 80th Avenue house, which was executed on March 14, 2013. When detectives arrived at the house, Allen asked if they were narcotics officers. When they told him they were homicide detectives, Allen started crying and became distraught. Allen pointed out where the murder had occurred. The dining room floor had been covered in laminate flooring, but the police ripped it up and found evidence underneath. Swabs were taken from the dining room near the baseboard, which tested positive for Brooks's blood.

A black Mossberg shotgun was retrieved from the attic crawlspace in the closet of the northeast bedroom. The People's firearm and ammunition expert could not determine whether that shotgun fired the pellets and wadding provided by the coroner's office after the death of Brooks. Allen did not believe it was the murder weapon or that Walker ever touched the Mossberg. Allen had put it in the attic as the officers kicked down the door to serve the warrant. A second firearm was found in Allen's truck. Allen was arrested that day for being an ex-felon in possession of a firearm.

The weapon recovered from Allen's truck was a sawed-off, pump-action shotgun with a wooden stock, which matched Mechelle's description. That shotgun, People's Exhibit No. 9, was believed to be the murder weapon, but Allen did not recognize it from the night of the shooting. Allen said he found Exhibit No. 9 in a tent in the backyard and put it into his truck. He did not remember how long the shotgun had been there. Sergeant Eric Milina of the Oakland Police Department testified that Allen did not disclose his possession of the murder weapon to the police despite being directly asked the shotgun's whereabouts.

Allen, Marshall and Tolliver (the only ones home when the warrant was executed) were taken to the Oakland Police Department for questioning. The officers took precautions to make sure the three were kept separate. Still, each of them identified Walker as Nephew and as the person who shot Brooks, and each named Lawrence and Mechelle Landry as also being involved. Warrants were issued for Walker, Lawrence, and Mechelle.

Walker was arrested on March 19, 2013, as he tried to escape out the back door of a different home on 80th Avenue. Officers recovered a handgun at that residence that belonged to Walker, but it was not the murder weapon.

Lawrence was arrested and interviewed in April 2013. He said he was relieved to tell his story and asked the officers for paper so he could write a statement. Mechelle turned herself in in August 2013.

Lawrence, Marshall, Mechelle, Tolliver and Allen were all charged with being accessories after the fact. They all pled guilty or no contest and agreed to testify against Walker at his trial in exchange for sentences of time served instead of a two-year prison term. They had not been sentenced at the time of Walker's trial.

Walker had a jury trial. His attorney, Thomas Broome, did not present any evidence in his defense. Trial counsel's theory of the case, derived from Walker's own pretrial statements, was that Walker was not the shooter and was not even at the drug house at the time of the shooting. He used the testimony at trial to try to convince the jury that every one of the witnesses against Walker had credibility issues and a motive to lie.

Broome argued to the jury that Allen could have been the shooter. He stressed Allen's testimony that he did not remember seeing Walker there on the night of the shooting. (Allen had testified that he had been awakened from sleep by the commotion in the house, it was too dark to see anyone at first, and things were so chaotic that he could not remember seeing Walker.) Broome reminded the jury that Allen had been convicted of unlawful weapons possession, and the murder weapon was ultimately found in his truck.

Broome asked the jury to return a not guilty verdict, or "if anything" heat-of-passion manslaughter, because the killing occurred during an argument. The manslaughter argument was brief and probably viewed as a fallback position by the jury, though it was, in our view, a more plausible defense. We do believe the jury, however, could understand and deal with the concept of alternative arguments.

The jury was instructed on first and second degree murder, provocation and sudden quarrel/heat-of-passion manslaughter, but not on self-defense or imperfect self-defense. The jury found Walker guilty of first degree murder and found the firearm and great-bodily-injury enhancements true after deliberating for approximately seven hours. At one point the jury sent the judge a note saying they were unable to agree "whether the act was deliberate" for purposes of first degree murder. The judge instructed them to refer to CALCRIM No. 521. Three hours later they returned a guilty verdict of first degree murder.

After the verdict, new counsel, Kimberly Kupferer, was appointed to represent Walker after Broome suffered a stroke. Kupferer filed a comprehensive motion for a new trial, with numerous exhibits, based on Broome's alleged ineffective assistance. The People opposed the motion. The evidence presented on the motion will be summarized in part II.A.2. of this opinion. The motion was heard and denied on December 5, 2014.

Walker was sentenced on December 12, 2014 to a term of 50 years to life in prison: 25 years to life for first degree murder (§§ 187, subd. (a); 190, subd. (a)), with a consecutive 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)).

II. DISCUSSION

A. Ineffective Assistance of Counsel

The primary issue on appeal is ineffective assistance of counsel. Appellate counsel suggests Broome should have investigated and presented a defense of self-defense or imperfect self-defense instead of the strategy he actually pursued. On appeal, Walker raises two theories of ineffective assistance of trial counsel: (1) failure to investigate and develop a viable theory of self-defense or imperfect self-defense; and (2) failure to request jury instructions on self-defense and imperfect self-defense, and failure to argue those theories to the jury, even based on the evidence presented at trial. He also argues the errors of counsel were cumulatively prejudicial and deprived him of a fair trial and due process.

1. *The Law*

Ineffective assistance of counsel may be raised in a motion for new trial, even though it is not one of the statutorily enumerated grounds. (*People v. Fosselman* (1983) 33 Cal.3d 572, 582.) "Defendant bears the burden of proving ineffective assistance of counsel." (*People v. Jackson* (1989) 49 Cal.3d 1170, 1188.) Under *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*), "a defendant must demonstrate that (1) counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's representation subjected the defendant to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant." (*People v. Samayoa* (1997) 15 Cal.4th 795, 845, citing *Strickland*, at pp. 687696.) In deciding whether counsel's performance was deficient, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Strickland*, at p. 689.)

Typically, a trial court's determination on a motion for a new trial is reviewed for abuse of discretion. (*People v. Turner* (1994) 8 Cal.4th 137, 212.) Where, as here, however, a nonstatutory new trial motion is grounded in a constitutional claim of ineffective assistance of counsel, a two-step standard of review applies. The first step requires the reviewing court to uphold the trial court's factual findings if substantial evidence supports the findings. (*People v. Taylor* (1984) 162 Cal.App.3d 720, 724.) In the second step, the reviewing court exercises its independent judgment on the legal issues: whether counsel's performance was deficient and whether the defendant was prejudiced as a result. (*Id*. at pp. 724–725.)

2. *The Motion for a New Trial*

Kupferer's motion for a new trial included as exhibits court records, police reports, documents culled from discovery, Broome's billing records, witness statements, and declarations, including the declaration of attorney Stuart Hanlon as a "*Strickland* expert," who reviewed the evidence and opined that Broome's representation fell below an objective standard of reasonableness and prejudiced Walker. The People opposed the motion, arguing Walker had shown neither deficient performance nor prejudice.

Following a hearing, the trial court denied the new trial motion, finding neither prong of the *Strickland* standard had been met. The court relied on the fact that defense counsel had plenty of time to reflect and prepare, and that there are many different ways to approach defending a client. In other words, the court found counsel's decision not to present self-defense[7] theories was tactical.

The evidence produced by Kupferer falls into four broad categories: (1) evidence relating to Brooks's character for violence; (2) evidence relating to Brooks having been armed when he was killed; (3) evidence of threatening behavior by Brooks on the night of the killing; and (4) evidence tending to show Walker was afraid Brooks was going to kill him when he fired the fatal shot. When it's all said and done, however, two pieces of evidence stand out as important to the possibility of a claim of self-defense. (1) The jury was not informed that Allen once told a prosecutor's investigator that, in cleaning up after the shooting, the group took a .45 caliber handgun off Brooks's body; and (2) the jury was not informed, either, that Tolliver once told a police interviewer that Walker told her that Brooks reached toward his waistband just before Walker shot him. For the reasons that follow, neither of these pieces of evidence was convincing proof of self-defense. In our view, appellate counsel overstates the probative value of the evidence submitted with the new trial motion.

a. Evidence of Brooks's Character for Violence

[7] When we speak of "self-defense" we intend to include imperfect self-defense (voluntary manslaughter).

Kupferer was able to develop evidence in support of the motion to the effect that Brooks was a violent man, a "hitter"—"a young man [who] doesn't have a problem killing you"—who had killed two people, and who "always" carried a gun, usually a 9 mm, a .357, or a Glock. Indeed, the vast majority of evidence she collected was bad character evidence about Brooks, some of it from Walker's relatives, some of it from court records, police reports, or third-party declarants.

The prosecutor had moved in limine to exclude all evidence and argument regarding Brooks's criminal history or prior misconduct. At the hearing, the prosecutor explained his understanding that Walker would be arguing he was not the shooter. The court agreed and granted the motion but said it could change that ruling if Walker decided to argue self-defense.

b. Evidence that Brooks was Armed

The jury was presented with consistent evidence that Walker shot an unarmed man in the back of the head because he was disrespectful and to prevent him from knocking on Marshall's door. Kupferer points to one piece of hearsay that Brooks may have been armed when he was killed, although three witnesses testified at trial they did not find a gun on or near his body. Johnson also testified she did not see Brooks with a weapon when he took off his clothes when they had sex before they went to 80th Avenue, nor did she see any weapons in his car. But Allen told the district attorney's investigator in an interview in May 2013 that he and the others removed a .45 caliber handgun—a "Clint Eastwood" type gun—from Brooks's body after he was killed. He also speculated that Brooks had a gun in his interview with the police, but he immediately back-tracked and said he did not think Brooks had a gun. At trial, Allen remembered few details of the night of the shooting, saying it all seemed to be part of a "nightmare." He remembered nothing but chaos before he got into Brooks's car with Mechelle.

Appellate counsel faults Broome for failing to impeach Allen at trial with this prior statement. The defense expert Hanlon indicated this, and his failure to investigate further, were Broome's biggest blunders and the most "troublesome" evidence that should have been brought out at trial but was not. Broome did ask Allen if he

remembered telling the police about "anything that might have been taken from the body of Billy Brooks like a gun," which shows Broome was aware of the "Clint Eastwood" statement, but Allen did not recall any such statement or questioning on that topic.

The statement in any event would have carried little weight without some substantiation, and Kupferer came up with nothing to corroborate Allen's statement. The other witnesses denied seeing a gun on Brooks. No gun was ever retrieved by police that matched Allen's "Clint Eastwood" description. No evidence was produced by Kupferer to show Brooks ever owned a .45 caliber handgun.

In addition, appellate counsel emphasizes that Tolliver told the police that Walker told her that Brooks was "reaching for something" when Walker shot him. When Tolliver described this "reaching" to Sgt. Milina, she reached towards her waistband area. It was clear from other evidence, however, that Tolliver was not an eyewitness to the actual shooting and only came out of Marshall's room afterwards. Since the statement came originally from Walker, Broome presumably had access to that statement independently of the police interview transcripts. In any case, Broome showed he was familiar with the March 2013 interview in his cross-examination. Tolliver testified she heard Walker say he shot Brooks because Brooks disrespected him and heard him say nothing else.

In any event, Kupferer, for all her effort, developed no evidence that Brooks actually carried a gun that night or displayed a weapon before or during the deadly confrontation with Walker or even that Brooks owned such a gun. The missing evidence that Kupferer supplied would have been only slightly supportive of a self-defense theory. And the record disproves Walker's contention on appeal that Broome was unaware of Allen's statement about the "Clint Eastwood" gun.

c. Evidence of Provocative or Threatening Behavior by Brooks

Although Walker insists that self-defense should have been asserted as a defense, Kupferer's investigation turned up no more threatening behavior by Brooks than Lawrence's trial testimony that he heard Brooks say, evidently in response to Walker's having pulled the trigger and his shotgun not having fired: "You [going to] pull an empty

gun on me at a gunfight? Pull an empty gun. Nigga, you [fucked] up." This statement suggests Brooks was surprised that Walker was trying to shoot him, but Walker argues it could also have signaled that Brooks was prepared to have a "gunfight" with Walker. (The police interview transcript shows Lawrence said "fight" in his original statement, not "gunfight.") The overheard statement was weak evidence at best that Brooks was threatening Walker, and it was before the jury on the heat of passion issue.

Kupferer also presented evidence that Johnson told Marshall and Marshall told the police that Brooks was "talking to her all crazy and . . . [¶] [He] came in all belligerent, talking drunk, talking crazy and shit. 'This is my house. This is him.' Then [Brooks and Walker] got into it. . . . He told [Walker] to shoot him." Johnson said Brooks told Walker, " 'Go ahead and shoot me[.]' " He was "[l]ike punkin' him out." These statements did not come out at trial, but they tended to show Walker shot Brooks in reaction to a dare or taunt by Brooks, not in actual or unreasonable self-defense.

d. Evidence that Walker Killed Brooks out of Fear

Appellate counsel points out that Walker told Allen he "had to" shoot Brooks. This was at best ambiguous and would not have helped Walker much, given the several statements he made to the effect that he shot Brooks because Brooks "disrespected" him. Appellate counsel emphasizes an interview with the district attorney's investigator, in which Allen supposedly said Walker told him he was afraid Brooks was "gonna kill him right then and there." The quoted language was from the investigator's question, however, not Allen's answer, and Allen's answer was not nearly as helpful to the defense. After prefacing his remarks with the word, "Yeah," Allen actually reported that Walker said, " 'I had to do it because I know if I wouldn't have killed him, he'd a came back and killed me.' " Self-defense is valid only if the defendant fears imminent harm. Fear of future harm does not justify a preemptive strike in the name of self-defense. (*People v. Stitely* (2005) 35 Cal.4th 514, 551.)

3. *Self-defense Theories Were Unlikely to Succeed*

One glaring flaw in Walker's ineffective assistance of counsel claim is that it ignores entirely Walker's pretrial statements denying that he acted in self-defense.

Sergeant Milina and his partner interviewed Walker before trial. When the officers told Walker that the people in the house on 80th Avenue had accused Walker of shooting Brooks, Walker emphatically and repeatedly denied doing so. At several points in the interview, the officers offered Walker the chance to explain or justify the shooting, but every time Walker rejected the officers' invitations and denied being the shooter altogether, including denying that it was an accident, a mistake, or that Brooks "tried to do somethin' " that caused Walker to react. Walker insisted he had "nothin' to do with it."

In fact, near the end of the interview, Sergeant Milina explicitly told Walker that the case against him would likely "boil down to" the question of "is it a murder or is it a self-defense type of thing?" Thus, Milina offered Walker one more chance to explain his actions, stating, "there's a difference between murder and somethin' that's a mistake or . . . somebody threatened you." Sergeant Milina told Walker he had "a right to defend [him]self inside [his] house," but expressed concern that "no one ha[d] given [Milina] a good reason why [the shooting] would happen." Walker nonetheless continued to deny being the shooter.

Despite these statements, appellate counsel relies on a declaration from Walker, which was an exhibit to the new trial motion, saying Walker was prepared to testify that he was "afraid for [his] life at the time [he] shot [Brooks] . . ." and acted in self-defense. In his declaration, Walker claimed to have known Brooks before the shooting, but he did not specifically say he recognized Brooks that night. He said he wanted to testify, and that he told his attorney less than a week before motions in limine were heard that he wanted to testify in support of a claim of self-defense, but trial counsel tricked him into giving up his right to testify.[8] Walker's expert, Hanlon, also expressed his belief that

[8] Walker claims in his declaration that during the People's case in chief, Broome told him he would be allowed to testify "later" in the trial. Then, after the People rested, Broome advised him it would be better if he did not testify, and Walker followed that advice, never having been told he had a right to testify. We would be troubled if those allegations were true, but no issue is made of this by appellate counsel, and the trial judge noted Walker had never expressed to the court the desire to testify.

Walker should have been called as a witness to testify on self-defense.

Walker would not have been a credible witness. His whole self-defense theory of the case bears all the earmarks of a belatedly contrived attempt to come up with a defense where none exists. Though the choice whether to testify was ultimately his own (*People v. Robles* (2007) 147 Cal.App.4th 1286, 1290), if Walker had taken the stand, he would have had many challenges to confront on cross-examination. For that reason alone, a self-defense theory was highly unlikely to succeed unless it could be supported without Walker's testimony, which is improbable.

4. *Analysis*

a. Deficient Performance

In addition to highlighting the foregoing evidence allegedly missing from the trial, appellate counsel attacks Broome's diligence and performance of his professional duties based on his billing records, infers he failed to read large segments of the discovery based on his failure to use it at trial or his failure to itemize it on his billing records, alleges he failed to consult with his client sufficiently, and criticizes his failure to consult an expert on intoxication to bolster a self-defense theory. These deficiencies are not supported by sufficient evidence to overcome the presumption of counsel's professional performance. Walker's more substantive complaints turn on Broome's failure to investigate and present evidence of Brooks's unsavory character and violent past, failure to investigate and present self-defense evidence, and ultimately selecting an uninformed, unreasonable (and unsuccessful) "whodunit" defense. With respect to missing evidence, it is troubling that Broome promised in his opening statement that he would prove Brooks had a gun and then failed to prove it. We note neither side has produced a declaration from Broome explaining his thinking in formulating and executing his trial strategy.

We conclude, however, we need not decide or discuss further whether Broome's performance fell below the objective standard of reasonableness required under *Strickland*, for, as explained below, we find any such errors were not prejudicial. *Strickland* itself admonishes that ineffective assistance of counsel claims can often be resolved by addressing the prejudice prong first. (*Strickland*, *supra*, 466 U.S. at p. 697.)

b. Prejudice

Despite Walker's catalogue of errors that Broome allegedly made, we conclude presenting a theory of self-defense or imperfect self-defense would have been equally unsuccessful with the heat of passion theory actually argued at trial. Evidence of failure to investigate alone is not enough to call for reversal unless the investigation would have led to admissible evidence supportive of a claim of self-defense or imperfect self-defense. (See *People v. Williams* (1988) 44 Cal.3d 883, 933 ["A factual basis, not speculation, must be established before reversal of a judgment may be had on grounds of ineffective assistance of counsel."]; *Dows v. Wood* (9th Cir. 2000) 211 F.3d 480, 486 [to establish that counsel was ineffective for failing to interview and produce an alibi witness at trial, a habeas petitioner must provide "evidence that this witness would have provided helpful testimony for the defense," such as an affidavit from the alleged witness]; *Gallego v. McDaniel* (9th Cir. 1997) 124 F.3d 1065, 1077 [no ineffective assistance of counsel where petitioner failed to show what additional evidence would have been discovered and how such evidence would have changed the result]; *Villafuerte v. Stewart* (9th Cir. 1997) 111 F.3d 616, 630 [rejecting claim of ineffective assistance of counsel based upon counsel's failure to interview witnesses because petitioner presented no evidence that "further investigation would have produced anything of assistance to the defense"].)

Even if we were to agree that appellate counsel's proposed defenses were substantially supported by the evidence presented with the new trial motion, we would not agree that the outcome of the trial was affected by omission of the evidence and self-defense theories from the trial. Our confidence in the verdict is not eroded by Walker's allegations of ineffective assistance of counsel.[9] (*Strickland*, *supra*, 466 U.S. at p. 694.)

[9] Walker contends Broome was per se incompetent because he told Walker's sister and uncle that a self-defense strategy would not work because Walker had not called the police as soon as he killed Brooks. Walker contends Broome's comment demonstrates ignorance of the law and deficient performance per se. We view his comment as a simplified explanation given to family members conveying that Broome did not believe a self-defense argument would be successful because Walker did not come up with that explanation early on. It does not constitute irrefutable evidence of ignorance of the law,

Walker argues the jury might have found the evidence of Brooks's behavior insufficient to show provocation or to justify a heat-of-passion manslaughter verdict, yet evidence of Brooks's possible possession of a gun, together with evidence that Brooks reached for his waistband just before being shot, might have convinced them Walker reacted out of fear and was trying to defend himself. Adding into the trial the evidence Kupferer developed, he argues, reasonably could have caused the jury to return an acquittal on grounds of self-defense or an imperfect self-defense manslaughter verdict.

We disagree. Most of Walker's additional evidence was relevant to Brooks's bad character. Defendants charged with violent crimes may offer evidence of a victim's character for violence to show the defendant acted in self-defense. (Evid. Code, § 1103; *People v. Tackett* (2006) 144 Cal.App.4th 445, 454.) Evidence of the victim's violent character can be relevant in two ways: (1) the defendant's knowledge of the victim's violent character tends to show the defendant's apprehension the victim would harm him or her was reasonable; and (2) if the defendant did not know about the victim's violent character, evidence of that character nonetheless tends to show the victim was probably the aggressor. (1 Witkin, Cal. Evidence (5th ed. 2012) Circumstantial Evidence, § 59, p. 437.)

The victim's violent character, however, is irrelevant unless there is "some evidentiary support for a self-defense-type theory that the defendant perceived the murder victim as presenting an immediate threat. . . . [E]ven if the murder victim were the most violent person in the world, that fact would not be relevant if the evidence made it clear that the victim was taken by surprise and shot in the back of the head." (*People v. Hoyos* (2007) 41 Cal.4th 872, 912-913; see also *People v. Gutierrez* (2009) 45 Cal.4th 789, 828 ["Where no evidence is presented that the victim posed a threat to the defendant, exclusion of evidence regarding the victim's propensity for violence is proper"].)

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and we seriously doubt Broome, an experienced defense attorney, was so fundamentally at sea on the law of self-defense.

Thus, evidence of Brooks's character for violence could potentially have been relevant if there were evidence that Brooks behaved in a threatening manner before he was shot or that Walker feared Brooks was about to kill or injure him. No such evidence was presented, and all we have is Walker's post-conviction, un-cross-examined declaration that he was scared. Regardless of Brooks's past conduct and reputation, a claim of self-defense would have required some evidence of threatening behavior by Brooks on the night he was shot. His reputation alone does not give anyone free rein to kill him at any time.

Even if Allen's "Clint Eastwood" gun remark had come into evidence, it would have carried little weight unless the defense could come up with some evidence that someone else saw the gun or at least that Brooks owned such a gun. Kupferer evidently found no evidence to corroborate Allen's remark, for none has been put before us. Thus, even with a rigorous investigation, no meaningful evidence was developed to show Brooks was armed that night, much less to show he brandished a gun or was threatening Walker.

The testimony was uniform that Brooks came into the house at 3:00 a.m. intoxicated, demanding loudly to see Nell Baby, claiming it was his "mama[']s] house," and wanting to buy drugs. He may have been drunk, high on cocaine, overly familiar, and obnoxious, but there is little to suggest he was threatening. None of Walker's contemporaneous statements to his friends expressed fear of Brooks. Instead, Walker said he shot Brooks because he "knocked on the wrong door" and because he "disrespected" Walker.

Brooks was shot in the back of the head behind the left ear, a problematic fact to begin with in claiming self-defense. But more than that, the witnesses who were asked denied finding a gun on or near Brooks when they moved and disposed of his body. The omitted fact that Walker claims is prejudicial—that Allen once told a prosecutor's investigator he had removed a gun from Brooks's body—as discussed above, is much weaker than appellate counsel acknowledges, and it was used in cross-examination at trial with little impact. (See part II.A.2.b., *ante*.)

Tolliver did not witness the shooting, as she was in Marshall's room, and could not have seen Brooks reach for his waistband. Her prior statement to police was that Walker told her Brooks was reaching for his waistband when Walker shot him. The statement could have been used in cross-examining her, but it was not, evidently because Broome had already decided not to use a self-defense theory. In the same interview Tolliver repeated that Walker complained that Brooks had "disrespected" him, Walker would not let anyone leave the house after the shooting, and that Walker was a "hothead." That no other witness reported hearing the statement about reaching for his waistband suggests it would have carried little weight with the jury.

All the testimony described a verbal argument between Walker and Brooks that ended with Walker shooting Brooks in the head. Walker presented insufficient evidence even on the new trial motion to support a viable self-defense case or an unreasonable but honest belief in the need for Walker to defend himself against Brooks's verbal remarks. Walker argues he need only present enough evidence to raise a reasonable doubt about the first degree murder verdict, but he has not done even that. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1103 (conc. opn. of Brown, J.).)

The evidence showed Walker was angry and felt "disrespected" at the time of the shooting, not that he was afraid. Walker points out that Marshall told the police that Walker looked "scared to death," but he only saw Walker after the shooting. There may have been reasons for Walker to be scared after the shooting, but no one except Walker's own declaration suggested Walker was scared at the time he pulled the trigger.

The jurors appear to have struggled with whether the verdict should be first degree or second degree murder. Though they were presented with evidence that might have led to a voluntary manslaughter conviction (heat of passion), they rejected that theory. They were instructed that provocation could reduce the crime to second degree murder, but they rejected that theory. We think they also would have rejected a self-defense theory because of Walker's own statements at the time of the killing and after. We find the alleged errors of counsel to have been harmless, considered singly and cumulatively. Walker was not deprived of due process or a fair trial.

B. Amendment to Section 12022.53

On October 11, 2017, the California Legislature passed Senate Bill No. 620 (Stats. 2017, ch. 682, § 2), which became effective on January 1, 2018. As pertinent here, the bill amended subdivision (h) of section 12022.53. That subdivision had previously required the trial court to impose an enhancement of 10, 20 or 25 years to life for discharge of a firearm during an enumerated felony, including murder (§ 12022.53, subds. (b), (c), (d)), resulting in imposition of an additional and consecutive 25 years to life term in Walker's case. (§ 12022.53, subd. (d).) The court was prohibited from striking an allegation or finding under section 12022.53. (Former § 12022.53, subd. (h).) Senate Bill No. 620 changed this by making imposition of the enhancement discretionary. (§ 12022.53, subd. (h).)

Walker contends he is entitled to avail himself of this favorable change in the law because the amendment to section 12022.53 is retroactive, applicable to all those whose convictions are not yet final on appeal. (See *In re Estrada* (1965) 63 Cal.2d 740, 748.) The Attorney General concedes the statutory amendment is retroactive , which accords with the case law. (*People v. Chavez* (2018) 22 Cal.App.5th 663, 712; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678-679.)

Therefore, "remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*People v. McDaniels*, *supra*, 22 Cal.App.5th at p. 425; accord, *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1109–1111; *People v. Johnson* (2019) 32 Cal.App.5th 26, 69.) In this case, the judge expressed some sympathy for Walker; he called him "not a bad person" from a "good family," and expressed some regret that he was bound by the law to sentence Walker so harshly. Hence, we must remand the case for a new sentencing hearing in which the court may decide whether to impose or strike the enhancement under sections 12022.53, subdivision (h) and 1385 in the interests of justice.

III. DISPOSITION

Remanded for resentencing, otherwise affirmed.

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STREETER, J.

WE CONCUR:

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POLLAK, P.J.

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TUCHER, J.